STATE OF MICHIGAN

COURT OF APPEALS

In re APPLICATION OF WISCONSIN ELECTRIC POWER COMPANY TO INCREASE RATES.

TILDEN MINING COMPANY, L.C., and EMPIRE IRON MINING PARTNERSHIP,

Appellants,

v

MICHIGAN PUBLIC SERVICE COMMISSION and LOUISIANA-PACIFIC CORPORATION,

Appellees,

and

WISCONSIN ELECTRIC POWER COMPANY,

Petitioner-Appellee.

UNPUBLISHED
May 8, 2014

No. 301111
MPSC
LC No. 00-015981

In re APPLICATION OF WISCONSIN ELECTRIC POWER COMPANY TO INCREASE RATES.

TILDEN MINING COMPANY, L.C., and EMPIRE IRON MINING PARTNERSHIP,

Appellants,

v

MICHIGAN PUBLIC SERVICE COMMISSION and LOUISIANA-PACIFIC,

Appellees,

No. 313605
MPSC
LC No. 00-016830

and

WISCONSIN ELECTRIC POWER COMPANY,

Petitioner-Appellee.

Before: OWENS, P.J., and MURRAY and RIORDAN, JJ.

PER CURIAM.

In Docket No. 301111, appellants Tilden Mining Company and Empire Iron Mining Partnership appeal as of right the decision of the Michigan Public Service Commission (PSC), permitting petitioner, Wisconsin Electric Power Company (Wisconsin Electric), to raise electric rates by $23,264,513 above those previously authorized. In Docket No. 313605, appellants appeal as of right a similar order permitting petitioner to raise electric rates by $9,197,912 above those previously authorized.

The two appeals have been consolidated for our review. We affirm in both dockets.

I. FACTUAL BACKGROUND

Appellants own and operate iron ore mines near Marquette, Michigan, and are customers of Wisconsin Electric. On July 2, 2009, Wisconsin Electric filed an application for a rate increase for its sale of electricity within the state, requesting a $42.1 million increase.[1] On July 5, 2011, Wisconsin Electric again filed an application for a rate increase, requesting a $17.5 million increase.[2] Over several objections from appellants, the PSC ultimately approved rate increases in the amounts of $23,264,513 and $9,197,912, respectively.

On appeal, appellants focus on two alleged errors underlying the PSC's decision. The first issue pertains to the Port Washington Generating Station (PWGS) lease costs. According to appellants, Wisconsin Electric was allowed to increase its rates partly to recover these PWGS lease costs, which appellants contend was improper as the lease costs were unreasonable and imprudent. The PSC declined to address this issue in Docket No. 301111 because in previous cases involving such costs, appellants reached a settlement agreement, and had not litigated this issue.

The second issue pertains to the allocation of Wisconsin Electric's substation costs. Appellants contended that Wisconsin Electric delivered electricity to them using a unique arrangement of just two substations, separate from the remainder of Wisconsin Electric's service

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[1] Docket No. 301111.

[2] Docket No. 313605.

area in Michigan. Nevertheless, Wisconsin Electric distributed its substation costs among all of its Michigan customers, which appellants argued resulted in a disproportionate amount of the substation costs being allocated to them. Appellants concluded that this method failed to account for their unique and isolated system, and resulted in an unjust and unreasonable rate.

Appellants now assert error based on these two grounds.

II. STANDARD OF REVIEW

The following standards apply when we review PSC decisions:

> The standard of review for PSC orders is narrow and well-defined. Pursuant to MCL 462.25, all rates, fares, charges, classification and joint rates, regulations, practices, and services prescribed by the PSC are presumed, prima facie, to be lawful and reasonable. A party aggrieved by an order of the PSC has the burden of proving by clear and satisfactory evidence that the order is unlawful or unreasonable. To establish that a PSC order is unlawful, the appellant must show that the PSC failed to follow a mandatory statute or abused its discretion in the exercise of its judgment. And, of course, an order is unreasonable if it is not supported by the evidence. In sum, a final order of the PSC must be authorized by law and supported by competent, material, and substantial evidence on the whole record.
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> An agency's interpretation of a statute, while entitled to respectful consideration, is not binding on the courts, and it cannot conflict with the Legislature's intent as expressed in the language of the statute at issue. [*In re Review of Consumers Energy Co Renewable Energy Plan*, 293 Mich App 254, 267-268; 820 NW2d 170 (2011) (quotation marks and citation omitted).]

Thus, "we review a factual determination by the PSC for whether it is supported by competent, material, and substantial evidence on the whole record." *Detroit Edison Co v Michigan Pub Serv Comm*, 264 Mich App 462, 471; 691 NW2d 61 (2004). As we have recognized:

> Judicial review of administrative agency decisions must not invade the province of exclusive administrative fact-finding by displacing an agency's choice between two reasonably differing views. When reviewing the decision of an administrative agency for substantial evidence, a court should accept the agency's findings of fact, if they are supported by that quantum of evidence. A court will not set aside findings merely because alternative findings also could have been supported by substantial evidence on the record.
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> In general, the PSC has wide latitude when choosing whether to credit expert witness testimony in a PSC case. It is for the PSC to weigh conflicting opinion testimony of the qualified ('competent') experts to determine how the evidence preponderated. Expert opinion testimony is 'substantial' if offered by a

> qualified expert who has a rational basis for his views, whether or not other experts disagree. Substantial evidence is more than a mere scintilla of evidence, but may be less than a preponderance of the evidence. The testimony of even one expert can be 'substantial' evidence in a PSC case. [*In re Review of Consumers Energy Co Renewable Energy Plan*, 293 Mich App at 268, 284 (quotation marks and citation omitted).]

However, "when the PSC exercises its 'legislative' ratemaking authority, we accord deference to the administrative expertise . . . of the PSC absent some breach of a constitutional standard or statutory mandate or limitation." *Detroit Edison Co*, 264 Mich App at 471 (quotation marks, citation, and brackets omitted).

III. PORT WASHINGTON GENERATING STATION

Appellants first contend that the PSC should have considered objections to the proposed cost recovery for the PWGS lease. Appellants assert that it was error for the PSC to decline to address this issue based on prior settlement agreements in other cases.

However, after appellants filed an appeal in Docket No. 301111, the PSC addressed the PWGS lease costs in another Wisconsin Electric rate case, Docket No. 313605. In the latter case, the PSC reevaluated the lease costs and addressed the merits of the appellants' arguments on the issue, ultimately ruling in favor of Wisconsin Electric.[3]

Hence, appellees filed a motion to dismiss in this Court based on mootness. In denying the motion, we found as follows:

> The Court orders that the motion to dismiss this appeal in part is DENIED because this appeal is not moot as to the issue involving appellee Michigan Public Service Commission's (MPSC) refusal to consider the merits of the relevant lease costs issue based on appellants' failure to raise that issue at an earlier point and appellants' entry into settlement agreements. The MPSC's position that its subsequent decision as to the merits of the lease costs issue in MPSC No. U-16830 renders the relevant issue in this appeal moot fails to consider that, as we take judicial notice of, motions for rehearing are pending in U-16830 and that the MPSC's decision as to the merits of the lease costs issue in that subsequent case could be subject to appellate review in this Court. See MCL 462.26(1). Thus, the relevant issue in this appeal is not moot because, if this Court ultimately agrees with appellants on that issue, it can grant meaningful relief by reversing the relevant holding of the MPSC and remanding to the MPSC for further appropriate proceedings to address the merits of the lease costs issue in which the ultimate resolution of subsequent proceedings as to U-16830 may be dispositive. See, e.g.,

[3] With respect to the PWGS facilities, the PSC found that it was "not persuaded that the terms of the leases were so egregious at the time of execution that the Commission should be compelled now to find the resulting costs unreasonable or imprudent."

> *McCracken v Detroit*, 291 Mich App 522; 531; 806 NW2d 337 (2011) (issue is moot 'if an event has occurred that renders it impossible for the court to grant relief'). [*In re Application of Wisconsin Electric Power Co to Increase Rates*, unpublished order of the Court of Appeals, entered September 18, 2012 (Docket No. 301111).]

However, subsequent to this Court's order, the PSC denied both appellants' and Wisconsin Electric's respective motions for reconsideration. More significantly, in the appeal from PSC Docket No. U-16830, the sole issue appellants raise is whether they should have to pay for costs relating to substations. Appellants did not assert any error in the PSC's determination—after a discussion of the merits— that recovery for the PWGS lease costs was proper.

Because appellants received the remedy they are seeking, namely, the PSC's consideration of the issue, and chose not to pursue on appeal, this issue is moot. *McCracken*, 291 Mich App at 531.[4]

IV. ALLOCATION OF DISTRIBUTION COSTS

We also conclude that the PSC's order adopting Wisconsin Electric's method for determining distribution costs, and in particular substation costs, is lawful and supported by record evidence. The rationale for the PSC's decision is reasonably related to overall electric customer fairness.

In support of their argument that the PSC erred, appellants cite only one statutory provision, MCL 460.11(6), which provides:

> This subsection applies beginning January 1, 2009. *The commission shall approve rates equal to the cost of providing service to customers of electric utilities serving less than 1,000,000 retail customers in this state.* The rates shall be approved by the commission in each utility's first general rate case filed after passage of the amendatory act that added this section. If, in the judgment of the commission, the impact of imposing cost of service rates on customers of a utility would have a material impact, the commission may approve an order that implements those rates over a suitable number of years. The commission shall ensure that any impact on rates due to the cost of service requirement in this subsection is not more than 2.5% per year. [Emphasis added.]

Notably, this provision does not contain a specific requirement that the PSC may only approve certain types of distributions of costs among customer classes, or equal distributions of

[4] We further note that in Docket No. 301111, appellants do not raise substantive arguments regarding the inclusion of the PWGS lease costs. They merely focus on the fact that the PSC erred in basing its ruling on previous settlement agreements. Therefore, in neither Docket No. 301111 or in Docket No. 313605, do appellants address the merits of this issue.

costs among customer classes. It only requires that the rates equal the cost of providing service. Thus, the PSC is correct that while MCL 460.11(6) requires allocation of distribution costs based on the cost of providing service, it does not otherwise limit the PSC's authority to choose a reasonable ratemaking formula to do so.

We also emphasize that the PSC generally has broad discretion to determine the reasonableness of rates. "The PSC is entitled to consider all lawful elements in determining rates." *In re Application of Consumers Energy Co*, 281 Mich App 352, 360; 761 NW2d 346 (2008) (quotation marks and citation omitted). Moreover, "the PSC is not bound by any single formula or method and may make pragmatic adjustments when warranted by the circumstances." *Id.* (quotation marks, citation, and brackets omitted). In addition, we give consideration to the PSC's construction of a statute it is empowered to execute, and will not overrule that construction absent cogent reasons. *In re Complaint of Rovas Against SBC Michigan*, 482 Mich 90, 103; 754 NW2d 259 (2008).

Here, the PSC's finding that Wisconsin Electric's demand-based allocation of the distribution costs was reasonable and would prevent rate instability and unfairness to customers is supported by the testimony of Eric Rogers. Rogers explained:

> Allocation of distribution costs among customer classes based upon demand is more appropriate than allocation based upon total plant assigned to each rate class because it eliminates disparate treatment of specific customers or customer groups based upon the cost of the specific substation plant serving them. It would not be reasonable to penalize a customer simply because [Wisconsin Electric] built a new or replacement substation to serve the specific customer. [Appellants' witness], however, is asking for favorable treatment simply because the substations serving the [appellants] may be older and more fully depreciated than the average substation in our Michigan service territory. Indeed, one could make the argument that older substations require more maintenance than newer substations, and therefore [appellants] should be allocated more substation O&M costs. We will not make that argument, however.

Rogers provided virtually identical testimony in PSC Docket No. U-16830. The PSC adopted this rationale in its opinion.

Moreover, contrary to appellants' assertions on appeal, they are not unique, as can be shown by amicus Verso's arguments that it, too, deserves special treatment. In fact, each small customer can argue that it is serviced by only one substation. Trying to parse out each customer's actual or equitable share of the distribution costs is impractical. Rogers also verified that the methods used in the instant case had long been used to allocate various distribution costs. While application of this allocation to large customers who are served by only one or two substations may be new, the method is not. In its order, the PSC was not persuaded that direct assignment was preferable to the traditional, demand-based method for allocating these costs. This longstanding practice is entitled at least to respectful consideration, and should not be

overruled absent cogent reasons. *In re Complaint of Rovas Against SBC Michigan*, 482 Mich at 103. Moreover, simply because appellants have provided a reasonable way of allocating these distribution costs does not render the PSC's decision unreasonable or unlawful.[5]

Therefore, we conclude that the PSC's chosen methodology is lawful and reasonable. Considering the expert testimony supporting the PSC's decision, we likewise reject appellants' argument that the PSC's decision was not supported by competent, material, and substantial evidence.

V. CONCLUSION

We find that any issue pertaining to the PWGS lease costs is moot. Further, we find that the PSC's chosen methodology regarding the allocation of substation costs is lawful and reasonable, and supported by competent, material, and substantial evidence. We affirm.

/s/ Donald S. Owens
/s/ Christopher M. Murray
/s/ Michael J. Riordan

[5] We recognize that the PSC, if it determined the evidence warranted it, could have established an alternative method of distributing the substation cost, such as appellants propose. However, our task merely is to determine if the PSC's chosen method was unlawful, meaning that "the PSC failed to follow a mandatory statute or abused its discretion in the exercise of its judgment." *In re Review of Consumers Energy Co Renewable Energy Plan*, 293 Mich App at 267-268. We find that the PSC has not.